

F A X C O V E R S H E E T

DATE: January 27, 2002

TO: Renata B. Hesse
Department of Justice

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RE: MICROSOFT SETTLEMENT

Number of pages including cover sheet: 7

Message

Pursuant to the Tunney Act, please find enclosed my comments on the Microsoft settlement.

January 27, 2002

VIA FACSIMILE & EMAIL

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW, Suite 1200
Washington, DC 20530-0001

Dear Sir/Madame,

The Microsoft settlement proposed by the Justice Department should not be approved by the court. It does not adequately prevent Microsoft from abusing its monopoly powers. It is also a poor solution in that it will be complicated to enforce and Microsoft will have economic incentive to try to circumvent the agreement.

No doubt, there are precise legal standards that the court must follow in reviewing the settlement and making its decision. As a layman, I cannot hope to address the intricate legal issues as to what is explicitly mandated by statute and precedence--I can only speak in broad terms. My background is that of an engineer (M.S. in EECS) with 20 years of experience using PC software at work and at home and that of a founder and officer of a small software development company. I comment mostly from the perspective of an end user of PC software products.

As a businessman, I have had substantial experience negotiating, implementing, and litigating business agreements. I have found that the best agreements are those that (1) align the economic interest of the two parties (i.e. there is no economic benefit to either party to try to circumvent the agreement) and (2) are simple. The proposed settlement agreement is neither.

As one example, the language in the agreement requires Microsoft to provide access to certain information only to viable business entities. In paragraph III(J)(2)(c), the proposed settlement states that Microsoft will not be required to provide API's or Documentation to an entity that fails to meet "reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business." Arguably, this language could allow Microsoft to exclude access to small businesses, start-ups, and Linux developers (or other non-profit type software developers) if it was in Microsoft's economic interest to do so.

For a second example, the proposed settlement requires Microsoft not to automatically override OEM settings. Paragraph III(H)(3)(b) says Microsoft must not seek permission from the end user for "[automatic] alteration of the OEM's configuration until 14 days

after the initial boot up of a new Personal Computer.” What does the agreement mean by initial bootup? Strictly speaking, “initial bootup” could be interpreted to mean the first time the unit is turned on by the manufacture or the local retailer (for testing & verification purposes) and not the first time the end user turns on the machine. (As an aside, why does Microsoft need to be able to automatically override any settings? It should be sufficient to notify the user in the manual or on-line help that the user can change his settings by selecting the proper options in his application program or Windows operating system.) If such a simple item is this complicated to interpret and enforce, what does it augur for the rest of the agreement?

While it may not be the perfect solution, separating Microsoft into two independent companies meets the criteria stated above for a good business agreement. One, a breakup is simple, once it is completed, it is done--there is no agreement to interpret. Two, a breakup eliminates any economic incentive for Microsoft to circumvent an agreement because there is no agreement to circumvent once the breakup is completed.

My strong feelings about this case arise because I constantly find I have no real choice in my selection of PC operating systems and applications. As much as Microsoft's legal counsel and economists may argue about the user having choices and being better off, I find from my personal experience, that I am not.

If I am unhappy with my GM car, I can easily switch with my next purchase to a Toyota, Ford, Chrysler, Honda, etc. at zero cost. If I dislike my Sony television, I can buy a Zenith, JVC, Philips, or Panasonic, etc. without constraint. Nowadays, I have the freedom to switch phone service or my television reception from cable to satellite. Even with my PC, I can switch from Dell to IBM, Compaq, HP or others. But, I cannot switch from my use of the Microsoft operating system or Microsoft applications without cost, so substantial as to be prohibitive.

On the surface it may appear that there are alternatives to Microsoft's operating systems and applications. However, there are six barriers which effectively prevent me from using a competitor's product. First, because of Microsoft's market dominance, there is far more support from other vendors for Microsoft's products. For example, an application program or peripheral such as a printer may not be supported under either the Apple or Linux operating systems. Other vendor's import/export utilities, synchronization functions or the like may only support dominant Microsoft applications such as Word or Excel. Similarly, web sites may be designed to function best with Microsoft Internet Explorer as compared to competing products.

As a concrete example, consider my brother's experience with the Apple IMac. My brother's children learned to use the IMac growing up because of its superior user interface as compared to Microsoft Windows. However, my brother is now finding that it is too difficult to support the IMac on his home network and DSL line. Vendors just do not provide the same support for Apple that they do for Windows. Additionally, it is too

difficult to maintain both Windows systems (for his use) and Apple systems. Therefore, he is forced to switch the children to using Microsoft Windows.

Second, if I wish to use a non-Microsoft product in an area where Microsoft is entrenched, I will be at a tremendous disadvantage when trying to share information. I will be speaking French when everybody else is speaking English. For example, given that everybody uses Microsoft Excel or Word, what real freedom do I have to select a different word processor or spreadsheet (even if superior) when I will be unable to share files with my clients or vendors.

Third, I have invested substantial time in learning to use and debug my existing Windows and Microsoft application programs. I cannot afford to switch to a competing operating system or application and start at ground zero on the learning curve. The amount of time it takes to learn to use a new application is enormous. It far outweighs the dollar cost of purchasing the product. To become as proficient in another word processor application as I am in Microsoft Word after years of use would take months at the very least. No one can afford that cost. As applications grow larger and more complex, this barrier grows larger and larger in Microsoft's favor.

In an interview, Bill Gates himself points out that Microsoft's biggest competitor (when they release a new operating system) is themselves. Users who have already invested time and money in purchasing and using an older version of Windows are loathe to switch to a new version because of the cost in dollars and time to install, debug, and learn the new version. Imagine then the barrier posed to a completely new operating system or application.

Fourth, there is risk that if I am using a non-Microsoft product, the vendor will eventually be forced out of business by Microsoft and I will ultimately have to switch to the Microsoft product anyway. This was the case with my Lotus and WordPerfect products. In both case, I was finally forced to switch to Microsoft products when the vendors went out of business. Now, if I need to choose between a Microsoft and competing product, the safe decision is to select Microsoft because it is likely the competitor will be eventually driven out of business.

Fifth, there is a cost to switch to a new application because of prior work (data files) that has been generated by the old application. If I have a substantial amount of prior work saved in data files produced by my Microsoft applications, switching to a competing application means I lose compatibility with all of my old work. At the very least, I will have to spend time converting the data files with the accompanying risk of losing information or formatting.

Sixth, It is risky to use a non-Microsoft product because Microsoft has the upper hand in keeping its applications in step with operating system upgrades and taking advantage of new operating system features. Microsoft is in a position to improve its products faster because it is also in charge of the underlying operating system. By the same token,

Microsoft applications are least likely to break with operating system upgrades. No competitor has that same advantage. (If Microsoft argues there is no advantage, then it should have no complaint against being separated into two independent companies).

In summary, I do not have the freedom to choose to use Microsoft products because they are superior but am forced to use them because the investment in time and potential risk to use competing products is too high.

There are many examples where Microsoft did not have a superior product (or, initially, even a product), but ultimately succeeded due to its monopoly position. For a non-exhaustive list, consider the products: Word (vs. WordPerfect), Excel (vs. Lotus), Internet Explorer (vs. Netscape), Microsoft Project (vs. Symantec's Timeline project management software) and even Windows (vs. the Macintosh). In each of these cases, Microsoft did not have the first product or even the better product. Yet, over time in each case Microsoft has either put the other product out of business or become the clear-cut market leader.

In these cases, Microsoft did not succeed because it was the innovator; but because it had a monopoly in the operating system market. It could use its ownership of the operating system and its monopoly profits to enter new markets and eventually push out the competition. No other company, even dominant ones such as Lotus, WordPerfect, and Novell with all their financial resources, has been able to compete successfully against Microsoft because of the monopoly Microsoft enjoys.

Another example of the monopoly power Microsoft enjoys, is its recent decision not to include JAVA in its latest version of Windows. Given the runaway popularity of JAVA, only a monopoly such as Microsoft could risk making that decision. In a competitive environment, no operating system vendor would decide to exclude JAVA and pursue its own initiative. Microsoft can afford to do that because it wields such absolute control over the operating system market. A consumer has no alternate choice of operating systems so he is forced to accept Microsoft's decision to exclude JAVA from the operating system.

As a final example, consider the operating system called "OS/2" developed and marketed by IBM. There can be no question that it was a superior operating system and years ahead of Microsoft Windows. It failed however because of the barrier posed by Microsoft's installed base of users. The fact that even IBM failed to make any headway in the market is further evidence of Microsoft's power as a monopoly.

Microsoft may argue that the reason for its success in all of the above examples is that it had the better product or strategy. This is patently false. Microsoft was not the first one to introduce a windowing operating system, an internet browser, the concept of a spreadsheet, a word processor, etc. Microsoft has only been successful in first copying and then outlasting the competition.

Microsoft argues that there is no need to regulate Microsoft as a monopoly because technology and the product landscape change so fast that not even Microsoft can exercise monopoly powers. I think it is just this argument taken in context of Microsoft's success time after time over the last decade that is the smoking gun. No company other than Microsoft has been so successful. It is so unlikely that in an area where the pace of change is this fast, that any one company could be so successful in every endeavor it undertakes, that it must be taken for granted that the company enjoys substantial monopoly power.

Contrast Microsoft's situation to that of microprocessors and Intel. Intel is a dominant market leader but faces fierce competition from AMD, Motorola, and others in the microprocessor market. As a result, we have seen a 100-fold or more increase in price vs. performance (comparing a 33MHz 80386 processor to a 2GHz Pentium II) over perhaps the last 10 years.

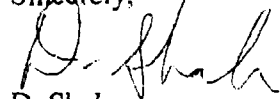
Imagine a situation where Intel enjoyed the same monopoly position that Microsoft does today. That is to say, there was effectively no competition from AMD, Motorola, or others. Without doubt, we would not have seen the same increase in performance vs. price. Intel would not have been forced to innovate and cut prices at the rate it is forced to do so today in order to maintain its market leadership. This is clearly evident from the reported news where each time AMD releases a microprocessor, Intel responds by cutting prices. Of course, there would still have been improvements in microprocessor performance if Intel was a monopoly, but nowhere near the current pace. Intel would have made slow improvements at its own unhurried pace under little pressure from others.

Microsoft has at times argued that it is not a monopoly because the price of its operating system software (as a percentage of the price of a PC) has come down over the years and this is characteristically untrue of monopoly pricing. Even if the price of software is in fact lower today than 10 years ago, it is a meaningless statistic. **The relevant question is what would the price of software be today if Microsoft did not enjoy a monopoly position.** As compared to the innovation fostered in the microprocessor arena due to competition, software performance has advanced relatively slowly. There certainly has not been a 100-fold increase in the performance of Microsoft's software over the last 10 years.

In considering the proposed settlement, the court must balance protecting Microsoft's rights and our system of free enterprise against the damage to society from continued abuse by Microsoft's monopoly position. I think the court must err on the side of the consumer. On a big-picture scale, there is no great damage to Microsoft, its shareholders or the concept of free enterprise by breaking Microsoft into separate operating companies. On the other hand, there is potential for great damage to innovation and free enterprise if Microsoft is free to remain a monopoly and to use its power to stifle new products and block the success of other companies.

In conclusion, the question simply comes down to whether the typical end user is better off because of Microsoft's monopoly. As a typical end user, I am firmly convinced that I am not and hope that the courts will take strict action.

Sincerely,



D. Shah